United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1440

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1440

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UNITED STATES OF AMERICA,

APPELLEE,

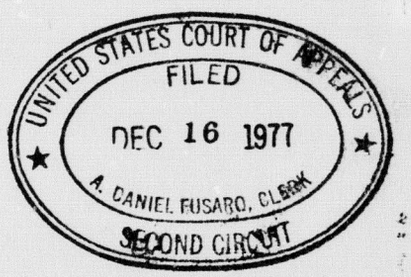
-vs-

VALDEMAR DaSILVA PEREIRA,

APPELLANT.

On Appeal From the United States District Court
for the District of Connecticut

BRIEF FOR APPELLANT



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QUESTION PRESENTED

May an alien charged with the crime of illegal reentry after deportation, 8 U.S.C. §1326, successfully defend himself by putting in issue the validity of his previous deportation on a basis that could not have been adjudicated at his deportation hearing?

STATUTE INVOLVED

Title 8, U.S. Code, §1326. Reentry of deported alien

Any alien who--

> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000 or both.

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

APPELLEE,

-vs-

VALDEMAR DaSILVA PEREIRA,

APPELLANT.

BRIEF FOR APPELLANT

STATEMENT

Valdemar DaSilva Pereira was convicted on his plea of guilty of violating 8 U.S.C. §1326, return to the United States without permission after arrest and deportation. By agreement, he preserved this appeal of the denial of his pretrial motion to dismiss the indictment. See United States v. Burke, 517 F.2d 377, 378-79 (2d Cir. 1975). A committed sentence of one year has been stayed pending appeal. App. 31.

The indictment charged that Mr. Pereira was arrested and deported from the United States on April 25, 1975, and that on May 16, 1977, he was knowingly and wilfully present in Connecticut, without having obtained the advance permission of the Attorney General to return. By pretrial motion to dismiss, with supporting affidavits, exhibits, and memoranda of law, the defendant offered to prove that he was deported in 1975 pursuant to 8 U.S.C. §1252(f), which has the effect of reinstating previous orders of deportation. This order incorporated an earlier order of deportation based upon his convictions in New Haven County Superior Court in 1965.[1/] He contended that the guilty pleas

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1/ Mr. Pereira first entered the United States in 1958 as the 14-year-old unmarried child of a Permanent Resident Alien. He was ordered deported on account of his convictions on December 7, 1965, pursuant to 8 U.S.C. §1251(a)(4). This order was executed on September 2, 1966, by returning him to Portugal.

On March 2, 1968, he returned to this country as a stowaway. At a deportation hearing held January 26, 1970, and February 10, 1970, the 1965 order of deportation was reinstated pursuant to 8 U.S.C. §1252(f). He was also prosecuted criminally and convicted June 27, 1970, on a guilty plea for violation of 8 U.S.C. §1326 and sentenced to two years' imprisonment. Upon his parole, the renewed order of deportation was executed June 28, 1971.

Mr. Pereira was apprehended again attempting to enter the United States on December 28, 1971. Prosecuted again, he pleaded guilty to stowing away, 18 U.S.C. §2199, and on February 23, 1972, was sentenced to time served. After completing a parole violation term based upon his 1970 conviction, he was deported on November 7, 1972.

A third entry as a stowaway on May 29, 1973, led to a deportation hearing on April 21, 1975, at which the 1965 order was again reinstated under 8 U.S.C. §1252(f). He was deported on April 25, 1975.

Mr. Pereira returned to the United States on December 22, 1975, when he again entered as a stowaway. His (cont'd on p. 3)

which underlie these convictions were involuntary and unconstitutionally obtained. The defendant argued: (1) that such convictions could not be used directly or indirectly to support his guilt on the offense now charged, and (2) that a deportation based upon such convictions was not lawful and hence could not form the predicate for a criminal prosecution under 8 U.S.C. §1326.

Through his moving papers, Mr. Pereira offered to prove that all of his problems with immigration flow from his convictions in 1965 on charges related to several instances of breaking and entering. In his affidavit, Supp. R. 2, he recounted his arrest on January 31, 1965; that he was without counsel until March 1, when a four-count information was filed; that prior to March 3, the day of his guilty pleas to all charges, he spoke with counsel only once and that this conversation concerned bail; that on March 26, 1965, he pleaded guilty to two additional charges and was sentenced to an aggregate two to seven years in prison.[2/] Mr. Pereira

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1/ (cont'd) apprehension in May, 1977, led to a telephonic deportation hearing May 26, 1977, and another reinstatement of the 1965 order for deportation based on 8 U.S.C. §1251(a)(4). This order cannot be executed until the present criminal proceedings are resolved. See 8 U.S.C. §1252(h). He has since begun to take steps to regularize his status under 8 U.S.C. §§1153(a)(2), 1182(h).

Administrative transcripts and other documents relating to these proceedings are contained in the Record on Appeal in this case.

2/ Mr. Pereira did not appeal his convictions, nor has he sought collateral postconviction relief. Cf. United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970)("Boykin" decision not retroactive).

swore that he could not recall being aware in March 1965 of the constitutional rights which he waived by his pleas of guilty, including his rights to jury trial, confrontation and freedom from compulsory self-incrimination. The only surviving transcript supports Mr. Pereira's recollection. The transcript for March 26, 1965, when twc additional guilty pleas were entered and sentence was imposed, reveals no inquiry into voluntariness. Supp. R. 4. In support of the motion, the defendant submitted two other affidavits of a law student intern for defense counsel, Supp. R.1, 3, who conducted interviews with all those present in 1965: the defendant's former counsel, the State's Attorney, the court reporter, and the presiding judge, Hon. John R. Thim (now a State Referee and a retired Justice of the Connecticut Supreme Court). None could recall the particulars of Mr. Pereira's plea proceedings, but Justice Thim stated that his practice in 1965 when a defendant was represented by counsel was to make no inquiry into the voluntariness of a guilty plea. The defendant's former counsel told the investigator that he also recalled only one pre-March 3 consultation with his client, but that he believes he would have discussed with him the direct consequences of a plea. Both Mr. Pereira and his former lawyer stated, however, that they did not recall understanding that the pleas would result in deportation (unless a recommendation against it were obtained from the judge under 8 U.S.C. §1251(b)(2)). Mr. Pereira

emphasized that he treasured his right to remain in the United States above his liberty and would have accepted a much harsher sentence to avoid deportation.

In response, the government argued that even if Mr. Pereira could prove his 1965 convictions were entered on the basis of involuntary guilty pleas (which it did not concede), this would provide no defense to a charge under 8 U.S.C. §1326. After receiving the briefs, to which all the documentary evidence was attached, the court (Hon. Robert C. Zampano, Sr. U.S.D.J.) heard oral argument. He refused to allow a hearing into the voluntariness of Mr. Pereira's 1965 pleas and denied the motion to dismiss from the bench, on the ground that: "The Court is in agreement with the reasoning in the cases cited by the Government, particularly the Bruno case and Judge Metzner's [Mohammed] case."[3/] Tr. 19; App. 25.

At the suggestion of Judge Zampano, Mr. Pereira then moved for recusal, and the case was reassigned to Hon. T. F. Gilroy Daly, U.S.D.J. App. 30. The change of plea, sentencing, and this appeal followed. App. 1,4. The appellant is now at liberty[4/] under a $4,000 administrative surety bond imposed by I.N.S. and a $1,000 nonsurety appeal bond.

3/ United States v. Mohammed, 372 F. Supp. 1048 (S.D. N.Y. 1973); United States v. Bruno, 328 F. Supp. 815 (W.D. Mo. 1971). These cases are discussed infra.

4/ Mr. Pereira is the father of two teenaged American citizen children by his first marriage. He married again in July, 1976, and his wife is also an (cont'd on p. 6)

ARGUMENT

AN ALIEN CRIMINAL DEFENDANT CHARGED WITH UNAUTHORIZED REENTRY AFTER DEPORTATION IS ENTITLED, UPON HIS DETAILED PRELIMINARY SHOWING, TO A HEARING INTO THE LAWFULNESS OF HIS PRIOR DEPORTATION AND TO A DEFENSE BASED UPON THE INVALIDITY OF THAT DEPORTATION ON A GROUND THAT COULD NOT HAVE BEEN SUCCESSFULLY ASSERTED BEFORE THE IMMIGRATION JUDGE.

The appellant offered below to show that the twelve-year-old convictions on which his deportations have been based were unconstitutionally obtained and invalid. He argued that neither the Constitution nor the statute under which he was prosecuted permits a conviction for reentry without permission after deportation, under these circumstances. The district court erred in rejecting his contention.

A. A Conviction Invalid Under "Boykin" May Not Be Used to Support Guilt on a New Criminal Charge.

Boykin v. Alabama, 395 U.S. 238 (1969), held that a guilty plea is a waiver of fundamental constitutional rights, and that the knowing and intelligent character of such a waiver--necessary to its validity and hence to upholding any

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4/ (cont'd) American citizen. Since this appeal was filed, the District Director of INS has approved Mrs. Pereira's petition for determination of Mr. Pereira's visa status, thus recognizing the genuineness of their marriage, and has also granted Mr. Pereira special permission to work at a regular occupation while completing his pending legal procedures.

conviction premised upon it--cannot be inferred from a silent record. Judge Newman's leading decision in United States v. Megura, 394 F. Supp. 246 (D. Conn. 1975), held that a criminal prosecution may not be predicated upon a prior conviction obtained in violation of Boykin. Accord, United States v. O'Neal, 545 F.2d 85 (9th Cir. 1976); United States v. Princepaul, 540 F.2d 417 (9th Cir. 1976); United States v. Cody, 529 F.2d 564 (8th Cir. 1976)(dictum).

In Megura, the defendant's prior felony conviction had been obtained upon his plea of guilty, and the transcript of the plea proceeding revealed, as also appears in the present case, that no inquiry was conducted to ascertain the voluntariness of the plea. Conceding the invalidity of this prior conviction, the government on its own motion dismissed the counts of the indictment which charged the defendant with possession of a firearm after having been convicted of a felony. Thereafter, on the defendant's motion, the court also dismissed the counts which charged the defendant with making a false statement respecting this prior conviction in the acquisition of a firearm on the ground that the constitutionally invalid conviction formed "an indispensable part of the government's affirmative case" and "would plainly be used to support guilt within the meaning of Burgett v. Texas, [389 U.S. 109 (1967)]." 394 F. Supp. at 249.

In Burgett, the Supreme Court held that a prior conviction obtained in violation of Gideon v. Wainwright, 372 U.S.

335 (1963), could not be used to support guilt or enhance punishment under a recidivist statute. The Megura court read Burgett as also prohibiting the use of a conviction obtained in violation of Boykin, as both Boykin and Gideon "are concerned with the validity of convictions and with the integrity of the process by which convictions are obtained." 394 F. Supp. at 249.

The Supreme Court's refusal in Burgett to permit use of a constitutionally infirm conviction either to support guilt or enhance punishment for another offense was premised upon two fundamental considerations which also apply to this case: the erosion of the constitutional principle under which the prior conviction is defective, and the fact that the accused in effect suffers anew from the prior deprivation of a constitutional right. Burgett, 389 U.S. at 115. For similar reasons, the Supreme Court has required resentencing when the sentencing court took into consideration a conviction obtained in violation of Gideon. United States v. Tucker, 404 U.S. 443 (1972). The Court has held that such a conviction may not even be used to impeach a defendant on cross-examination. Loper v. Beto, 405 U.S. 473 (1972). The Fifth Circuit has read these cases to mean that a conviction in violation of Gideon (and, as Megura held, such a conviction is not consequentially different from one obtained in violation of Boykin) is "not a conviction at all" and "cannot be judicially used for any purpose." Dameron v. United States, 488 F.2d 724 (5th Cir. 1974)(emphasis added).

A defendant's constitutionally infirm conviction need only be "an important factor" in a judicial determination against him before Burgett, Loper, and Tucker will prohibit its use. See Kelley v. United States, 487 F.2d 898, 899 (6th Cir. 1973). In this case, Mr. Pereira's prior conviction has provided, in two respects, the basis of the order of deportation, in alleged violation of which he returned to the United States, thereby allegedly committing the offense charged. The conviction not only established the ground for his first deportation in 1966, but also triggered the operation of 8 U.S.C. §1252(f),[5/] which authorized reinstatement of this original order of deportation on each of the subsequent occasions that the defendant was deported from the United States, including his deportation on April 25, 1975, which preceded this return to the United States and forms the basis of the present prosecution. But for his challenged prior convictions, there would be no prosecution of the appellant for the present offense. To uphold this prosecution is thus tacitly to ratify a constitutional deprivation and to inflict it upon the appellant anew.

5/ 8 U.S.C. §1252(f) authorizes the deportation of any alien who has unlawfully reentered the United States after having been previously deported on any ground described in 8 U.S.C. §1252(e). Among the grounds for deportation described in 8 U.S.C. §1252(e) is conviction for a crime involving moral turpitude (8 U.S.C. §1251(a)(4)), which was the basis for Mr. Pereira's original 1966 deportation.

B. The Defendant May Challenge the Validity of the Immigration Proceeding by Which He Was Deported From the United States as a Defense to Prosecution Under 8 U.S.C. §1326.

As a defense to any criminal prosecution arising from violation of an order of deportation, a defendant may assert the invalidity of the order. In United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975), Judge Leonard P. Moore of this Court, sitting by designation, declared that the lawfulness of a defendant's deportation is "a material element of the defense defined by 8 U.S.C. §1326." Id. at 152. The Third Circuit has similarly allowed a defendant to attack the order of deportation as a defense to prosecution for unauthorized return to the United States after deportation. United States v. Bowles, 331 F.2d 742 (panel), opinion denying rehearing, 334 F.2d 325 (per curiam, en banc)(3d Cir. 1964). Analogously, in a prosecution for willful failure to obey an order of deportation and depart the United States, the Seventh Circuit held that "the validity of [the order] is an inescapable ingredient of the statutory offense." United States v. Heikkinen, 221 F.2d 890, 892 (7th Cir. 1955); opinion after retrial, 240 F.2d 94 (7th Cir. 1957), rev'd on other grounds, 335 U.S. 273 (1958). As Judge Moore put it, the word "deported" in 8 U.S.C. §1326 means "deported according to law." Gasca-Kraft, 522 F.2d at 152; accord, Bowles, 331 F.2d at 749.

The cases upon which the government and the court below relied are either inapposite or unpersuasive. In United States v. Mohammed, 372 F. Supp. 1048 (S.D.N.Y. 1973), the defendant sought a continuance of his criminal prosecution so that he might move administratively to reopen his deportation case on the ground of ineffective assistance of retained counsel. The government opposed the request, taking the position (contrary to its position in this case) that the defendant could assert the invalidity of his prior deportation as a defense to the charge under §1326. Thus, Judge Metzner was without adversarial argument when he listed what he took to be opposing cases on both sides and ruled without analysis that no such defense was available. In United States v. Bruno, 328 F. Supp. 815 (W.D.Mo. 1971), a district court ruled that the invalidity of the prior conviction under Boykin could not be raised as a defense. But that ruling does not discuss the Constitutional argument under Burgett as applied in Megura (see Part A supra). Moreover, while that court was willing to assume arguendo that a deportation order could be attacked for a defense as irregular under the Immigration and Nationality Act (8 U.S.C. §1252(b)(1-4)), the decision did not consider the argument (pp. 14-15 infra) that a deportation based on such a conviction does not conform to id. §1252(b)(4).

Likewise, neither of the Court of Appeals cases from other circuits which the government relied on below addresses

the kind of defense raised here. In Arriaga-Ramirez v. United States, 325 F.2d 857 (10th Cir. 1963), the defendant did not raise any flaw in his prior deportation but rather sought reversal because the government had not proved its validity as an element at trial. It is easy to see why the court held that burden to be unnecessary. Here, by contrast, the defendant presented a specific flaw in the prior deportation based solely on an unconstitutional conviction. He presented substantial evidence in support of that claim in the form of affidavits. Arriaga-Ramirez does not support the denial of a pretrial hearing on the defendant's motion.

In United States v. Gonzalez-Parra, 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971), the defendant sought dismissal before trial through an attack on the facial constitutionality of 8 U.S.C. §1326, because it did not provide a jury trial de novo on his previous deportability. He complained that he would like to prove he was actually exempt from deportation because of his family status (8 U.S.C. §1251 (f)), although he had never presented this claim before the immigration judge, who would have had full authority to rule on it. The trial judge rejected this broadside attack, but reviewed the INS record and found "substantial grounds" for the prior deportation. The Fifth Circuit affirmed, holding that the district judge's pretrial review of the administrative record afforded the defendant the same judicial review he would have received had he invoked the procedures of

8 U.S.C. §1105a. 438 F.2d at 698. Compare United States v. Osuna-Picos, 443 F.2d 907 (9th Cir. 1971), reversing a §1326 conviction where the defendant showed he had a valid exemption from deportation, never invoked, under §1251(f). In this present case, on the other hand, the invalidity of Mr. Pereira's conviction was beyond the competence of an immigration judge to adjudicate. See Marino v. INS, 537 F.2d 686, 693 (2d Cir. 1976). Accordingly, even if Gonzalez-Parra and not Osuna-Picos is correct, the appellant here was entitled to have his claim reviewed and his defense considered by the district court.

This Court has not passed upon the exact issue of whether the defendant may assert such a defense to prosecution under 8 U.S.C. §1326. By the law of this Circuit, an alien may not challenge the validity of a prior order of deportation in a civil proceeding to avoid being deported anew for returning to the United States in violation of the order. U.S. ex rel. Bartsch v. Watkins, 175 F.2d 245 (2d Cir. 1949). However, this holding is not apposite in the context of a criminal prosecution and should not be extended to the present case. Dissenting in United States v. Spector, 343 U.S. 169, 177-78 (1952),[6/] Justice Jackson remarked:

6/ The majority in Spector, which had before it a different issue, did not disagree with Justice Jackson on this point. The dissent was joined by Justice Frankfurter, and Justice Black remarked that he had "not seen a satisfactory reason for rejecting this view." 343 U.S. at 174 n.2.

> We must not forget that while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with a crime. ...
>
> Administrative determinations of liability to deportation have been sustained only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. (Footnotes omitted and emphasis added).

An order of deportation issued in violation of the requirements set forth in 8 U.S.C. §1252(b) is not valid and may not provide the basis of a prosecution under 8 U.S.C. §1326. Cf. Heikkinen, supra, 221 F.2d at 893 (former 8 U.S.C. §156). Accordingly, constitutional and statutory defects in the underlying immigration proceedings are fatal not only to the order of deportation but also to the government's case against the defendant for violating 8 U.S.C. §1326. Gasca-Kraft, supra, 522 F.2d at 152; Bowles, supra, 331 F.2d at 750.

An order of deportation is not valid under 8 U.S.C. §1252(b)(4) unless it is based upon "reasonable, substantial, and probative evidence." See Heikkinen, supra, 221 F.2d at 893. The Bowles court held that an order of deportation is similarly defective where there is "no basis in fact" respecting the administrative conclusion of deportability. 331 F.2d at 750. The only basis for the administrative conclusion of deportability on April 25, 1975, is the defen-

dant's convictions in New Haven County Superior Court in March, 1965. If this conviction was obtained in violation of Boykin v. Alabama, supra, the conviction is constitutionally infirm and under Burgett v. Texas, supra, it should not be used in this proceeding for any purpose. See Point A. supra. Specifically, it may not be used to provide the requisite basis in fact to validate the order of deportation which the defendant allegedly violated by returning. An unconstitutional conviction is not a "reasonable, substantial, [or] probative" basis for an order of deportation. Cf. Megura, supra, 394 F. Supp. at 248. Hence, this Court need not reach the Constitutional question whether Burgett prohibits a Boykin violation from being used to support a deportation order in a prosecution under 8 U.S.C. §1326; the Court should rule that 8 U.S.C. §1252(b)(4) excludes its use as a statutory matter as well.

C. The Appellant's Preliminary Showing Was Sufficient.

The government never contended below that the defendant failed to make an adequate preliminary showing by affidavit of the invalidity of his 1965 convictions. Instead, the government asked for a hearing if the court concluded that this defense could be raised. Mem. of P. & A. of U.S. (July 29, 1977), at 2, 7-8. Accordingly, the appellant notes only briefly that he presented affidavits calling seriously into

question whether he knowingly or intelligently waived his constitutional rights to trial, confrontation and silence.

The "test for determining the [constitutional] validity of guilty pleas . . . was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Kelleher v. Henderson, 531 F.2d 78 (2d Cir. 1976), quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970). According to Kelleher, "the determination of constitutional voluntariness must be based not only on whether required advice was omitted . . . , but also whether it would have made any difference, if given." Id. at 82. Accord, Caputo v. Henderson, 541 F.2d 979 (2d Cir. 1976). For Mr. Pereira, deportation was a totally unacceptable consequence of his guilty plea. Any suggestion that convictions on all six counts would authorize (indeed, virtually ensure) deportation from the United States[7/] would have influenced him not to plead guilty.

7/ Under 8 U.S.C. §1251(a)(4), an alien is deportable who is convicted of a crime involving "moral turpitude" committed within five years of entry and resulting in imprisonment for the full term of one year. Under the same provision, an alien is also deportable who has been convicted of two crimes involving "moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial[.]" Counts 1, 2 and 6 of the information to which the defendant pleaded guilty charged offenses committed within five years of entry; counts 3, 4 and 5 charged later offenses. Counts 1 and 2, and Counts 3 and 4 each clearly arose out of "single scheme[s]"; to what extent the others, or all of them, might also have been treated as a "single scheme" was arguable either way. See Nason v. INS, 394 F.2d 223 (2d Cir. 1968).

Moreover, the defendant is entitled to know even "indirect" consequences of his guilty plea. Cf. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974)(requirements of Rule 11 in federal proceeding). In Michel, this Court held that a judge is not obligated to inform an alien defendant of the prospects of deportation on account of his plea, but placed this responsibility squarely on defense counsel, relying upon the attorney's knowledge of his client's personal circumstances and upon his competency to explain "what indirect consequences the guilty plea may trigger." Id.

The "principal value of counsel to the accused in a criminal prosecution" lies in "the faithful representation of the interest of his client." Tollett v. Henderson, 411 U.S. 258, 267-68 (1973). Ordinarily, the primary interest of a criminal defendant is to avoid or minimize the penalty which the court may impose. In some cases, however, this is not so. Mr. Pereira offered to prove that his primary interest was to remain in the United States, even at the risk of a greater sentence. The defendant's attorney knew that he was an alien. He did not advise the defendant that his guilty pleas would almost surely result in his deportation, and possibly, the attorney was not even aware of this consequence. Counsel's advice to the defendant that he plead guilty to every count of the state information could not have advanced the interests of the defendant, because counsel

never knew that the defendant's principal interest was not avoiding imprisonment but remaining in the United States. In view of the defendant's strong desire to remain in this country, his guilty plea to offenses which would have subjected him to deportation was not advisable. See Tollett, 411 U.S. at 268. A guilty plea is not voluntary simply because it is entered with the advice of counsel. Without knowledge that his guilty plea to every count of the state information would result in his deportation, the defendant's plea could not be both voluntary and intelligent.

In Megura, supra, the government conceded the invalidity of the defendant's prior conviction, but Judge Newman refused to accept the argument that such a concession of invalidity was required when a conviction in violation of Boykin is "attacked collaterally to avoid its use as a predicate for an additional offense." 394 F. Supp. at 247. He reasoned that such a collateral challenge to a prior conviction, "regardless of when the conviction occurred," is to be resolved "by affording the petitioner a hearing to determine the voluntariness of the plea as a matter of fact." Id. In support of this reading of Boykin, Judge Newman cited two cases which stand for the proposition that once a petitioner has demonstrated that the plea taking was not conducted in accordance with Boykin, the validity of the conviction may be sustained only if the government "affirmatively proves in a post-conviction hearing that the plea was voluntary and

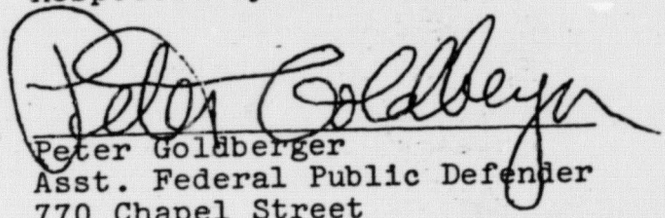
intelligent." Todd v. Lockhart, 490 F.2d 626, 628 (8th Cir. 1974); Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973). By pleading guilty, a defendant waives important constitutional rights, and under Carnley v. Cochran, 369 U.S. 506 (1962), the burden of producing evidence to prove an intentional relinquishment or abandonment of a known right or privilege is on the prosecution.

Under Boykin, it is impermissible to assume that a plea of guilty was both voluntary and intelligent on a silent record. The statements of Justice Thim regarding the practice of the Superior Court in taking guilty pleas evidence as clear a violation of the Boykin standard as was established in Megura. The appellant should have been afforded a hearing to determine the voluntariness and intelligence of his plea as a matter of fact.

CONCLUSION

The appellant made a sufficient showing to require an evidentiary hearing on the voluntariness of his pleas in state court in 1965. If the government failed to prove a valid waiver, he was entitled to dismissal of this prosecution, which is necessarily premised on those convictions. Accordingly, the judgment below should be reversed with directions to dismiss the indictment.

Respectfully submitted,



December 14, 1977

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CERTIFICATION

I hereby certify that I mailed two copies of the foregoing Brief and Appendix for Appellant, Valdemar DaSilva Pereira, to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut this 14th day of December, 1977.